No. 85-1286 (2)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

ROBERT H. MESSING,

Petitioner,

vs.

ALFRED SIMON,

Respondent.

On Petition for Certiorari to the New Jersey Supreme Court

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the retroactive application of an attorney disciplinary rule which effectively bars a libel suit by a grievant against a witness to attorney disciplinary proceedings is an appropriate issue for review by the United States Supreme Court on certiorari.

2. Whether retroactive application of an attorney disciplinary rule which effectively bars a libel suit by a grievant against a witness in attorney disciplinary proceedings constitutes denial of due process.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations ii

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement 4

Reasons for Denying the Writ 6

Conclusion 11

TABLE OF CITATIONS

Cases Cited:

Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971) 9, 10

Friedland v. Podhoretz, 174 N.J. Super. 73 (Law Div. 1980) 7

In the Matter of Hearing on Immunity for Ethics Complainants, 96 N.J. 669 (1984) 8

Contents

Page

Lands v. Basemen, 200 N.J. Super. 247 (App. Div. 1985) 10

Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982) 8

Paul v. Davis, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976) 7, 8, 9

Rodrigue v. Aetna Realty & Surety Company, 395 U.S. 352, 23 L. Ed. 2d 360, 89 S. Ct. 1835 9

Sperry v. Florida, 373 U.S. 379, 101 L. Ed. 2d 428, 83 S. Ct. 1322 (1963) 7

Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971) 7

Statutes Cited:

28 U.S.C. § 1257(3) 2

42 U.S.C. § 1983 8

Rules Cited:

New Jersey Court Rules:

R. 1:20 3

R. 1:20-3(f) 5

Contents

Page

R. 1:20-5 3

R. 1:20-5(b)(c)(d) 2

R. 1:20-5(d) 7

R. 1:20-10 3

R. 1:20-11 5

R. 1:20-11(b) 7, 10

United States Constitution Cited:

Fourteenth Amendment 8

Other Authorities Cited:

Constitution of New Jersey, Art. 6, Sec. 2, Paragraph 3 3

Pressler, Rules Governing the Courts of the State of New Jersey, with Comments and Annotations, Gann Law Books, 1986 Edition 2, 3

Pressler, Rules Governing the Courts of the State of New Jersey, with Comments and Annotations, Gann Law Books, 1984 Edition 3

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OPINIONS BELOW

The order of the New Jersey Supreme Court denying petitioner leave to appeal is unreported. *See* Petitioner's App. A, p. 1a. No opinion was rendered by the New Jersey Supreme Court. The opinion of the New Jersey Appellate Division is not reported (Petitioner's App. B, p. 2a).

JURISDICTION

Petitioner alleges jurisdiction under 28 U.S.C.A. § 1257(3). The order of the New Jersey Supreme Court (Petitioner's App. A, p. 1a) denying petitioner's application for leave to appeal was entered on November 1, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rules Governing the Courts of the State of New Jersey

> R. 1:20-11 Miscellaneous procedures in connection with disciplinary matters.
>
> (B) Immunity for grievants, clients and witnesses. Grievants in ethics matters, clients in fee arbitration cases and witnesses in both ethics and fee matters shall be absolutely immune from suit, whether legal or equitable in nature, for all communications to committees, fee committees, the director, the board, or to appropriate staff and for testimony given in ethics or fee arbitration procedings. This immunity shall not extend to any publication or distribution of information by a grievant, client or witness that violates R.1:20-10.
>
> Note: Adopted January 31, 1984 to be effective February 15, 1984. Source—Paragraphs (c), (d) and (e) formerly R. 1:20-5(b), (c) and (f). Pressler, *Rules Governing the Courts of the State of New Jersey, With Comments and Annotations,* Gann Law Books, 1986 Edition.

R. 1:20-10 Confidentiality.

(A) All proceedings conducted and records made pursuant to R.1:20 (discipline of members of the bar) shall be confidential and shall not be disclosed to or attended by anyone except as authorized by these rules or as provided by the Supreme Court . . . .

(Adopted January 31, 1984 to be effective February 15, 1984.) Pressler, *Rules Governing the Courts of the State of New Jersey, With Comments and Annotations,* Gann Law Books, 1986 Edition.

R. 1:20-5 Resignation; miscellaneous proceedings in connection with disciplinary matters.

(d) Confidentiality. All proceeding (sic) conducted and records made pursuant to R. 1:20 shall be confidential and shall not be disclosed to or attended by anyone except as authorized by these rules . . . .

(Adopted February 23, 1978, to be effective April 1, 1978); (d) Amended February 28, 1979 to be effective immediately, Pressler, *Rules Governing the Courts of the State of New Jersey, With Comments and Annotations,* Gann Law Books, 1984 Edition.

Constitution of New Jersey 1947, Article 6, Section 2, Paragraph 3.

Supreme Court, Rules; Admission to practice of law; discipline of persons admitted.

> The Supreme Court shall make rules governing the admission of all Courts in the State and, subject to the law, the practice and procedure in all such Courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

STATEMENT

Sometime prior to November of 1977, Robert Messing instituted an action for divorce against his wife, Norma Messing in the Superior Court of New Jersey, Bergen County, Docket No. M-11400-76. During the course of that matrimonial litigation, the question of equitable distribution of property was hotly contested by both parties. In an attempt to resolve the issue and to give the court guidance, Honorable John J. Cariddi, J.S.C. signed an order on November 15, 1977 appointing Alfred Simon, C.P.A to investigate and render to the court a report of the assets of the litigants.

The issue of equitable distribution of property was tried before the Honorable Conrad Krafte, J.S.C., Joel Albert, Esq., representing Mr. Messing and Susan Littman, Esq., representing Mrs. Messing. In addition to preparing his report, Alfred Simon, C.P.A. testified for approximately 12 days before Judge Krafte.

A written decision was rendered by Judge Krafte following a lengthy trial. Although the court's ruling was appealed, the parties settled their differences prior to the matter being heard by the Appellate Division of the New Jersey Superior Court.

In October 1982, the petitioner, Robert Messing, instituted suit against the respondent, Alfred Simon, charging him with acts of alleged malpractice and seeking both compensatory and punitive damages. That action is pending in the Superior Court of New

Jersey, Law Division, Bergen County, Docket No. L-11808-82.

On or about August of 1982, Robert Messing filed an ethics complaint against his wife's attorney, Susan Littman, Esq. The complaint was assigned to Frank Cuccio, Esq., a member of the District Ethics Committee for Bergen County, for investigation. Mr. Cuccio undertook his investigation and in the course of doing so, made an inquiry of the respondent, Alfred Simon, as to his knowledge of Ms. Littman's professional conduct.

On or about May 11, 1983, Mr. Cuccio submitted to the secretary of the District Ethics Committee his written findings recommending a dismissal of the complaint against Ms. Littman. In his written report, Mr. Cuccio referred to and paraphrased the various conversations he had with persons he spoke with during the course of his investigation, including conversations he had with the respondent, Mr. Simon. A copy of the written report was served on Mr. Messing as a complainant, as is required by the New Jersey Court Rules. R. 1:20-3(f).

On January 17, 1984, petitioner filed a second suit against respondent Alfred Simon alleging that he was slandered by Mr. Simon and again sought compensatory and punitive damages.

On January 31, 1984, the New Jersey Supreme Court adopted R. 1:20-11, to be effective February 15, 1984, which provides that "witnesses in both ethics and fee matters shall be absolutely immune from suit, whether legal or equitable in nature, for all communications to committees, fee committees, the director, the board or to appropriate staff and for testimony in ethics or fee arbitration proceedings."

Petitioner sought to subpoena Frank Cuccio, Esq., as a witness in the trial of the professional malpractice action against respondent. It is presumed that the petitioner sought to elicit from

Mr. Cuccio the substance of his conversations with Mr. Simon in the course of his duties as a member of the District Ethics Committee.

By order dated June 5, 1985, Honorable James T. Murphy, J.S.C., granted respondent's motion to quash the subpoena served upon Mr. Cuccio (Petitioner's App. E, p. 21a).

Petitioner sought leave to file interlocutory appeal from the Appellate Division of the New Jersey Superior Court. The Appellate Division issued a final order affirming Judge Murphy's order quashing the subpoena (Petitioner's App. B, p. 2a).

Petitioner filed a petition for certification with the New Jersey Supreme Court, which denied petitioner's application for leave to appeal (Petitioner's App. A, p. 1a).

REASONS FOR DENYING THE WRIT

Petitioner correctly points out that the order of Judge Murphy quashing the subpoena of Mr. Cuccio, served in the course of the professional malpractice action, acts as a termination of the slander action. Petitioner cannot prove the alleged slander without the testimony of Mr. Cuccio.

Petitioner asserts that certiorari should be granted pursuant to Rule 17(c) of the Supreme Court Rules,

> When a State Court or Federal Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this Court, or has decided a Federal question in a way in conflict with applicable decisions of this Court.

It is respectfully submitted, however, that the within matter

presents no issue of federal law. Rather, this is a simple slander action, which is totally within the domain of the states. Even when the tort of slander is committed by an officer of the state, the offense does not rise to federal or constitutional levels. *Paul v. Davis*, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976). Petitioner's argument that retroactive application of the rule of the New Jersey Supreme Court which denied him his cause of action for slander violates his due process rights, is not well taken.[1]

Further, this Court has steadfastly refused to become entangled in the regulation of attorneys admitted to any bar but its own. Petitioner, therefore, seeks review by this Court in another area of law traditionally reserved to the states besides tort law; *i.e.*, regulation and discipline of attorneys.

This Court has frequently held that the state has a legitimate and substantial interest in the regulation of the legal profession and the practice of law. *Sperry v. Florida*, 373 U.S. 379, 101 L. Ed. 2d 428, 83 S. Ct. 1322 (1963). A constitutional challenge of the disciplinary rules enacted by the New Jersey Supreme Court, this Court applied the *Younger* [*Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)] doctrine of abstention in the absence of a showing of bad faith, harassment, or that

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1. Respondent does not concede that R. 1:20-11(b) terminated petitioner's cause of action for slander. Rather, respondent has maintained consistently in the state courts that petitioner's cause of action never existed. Petitioner has argued that he had a perfectly viable cause of action for slander upon filing his complaint, but was denied his remedy when the New Jersey Supreme Court enacted R. 1:20-11(b). However, other New Jersey court rules, particularly, former R. 1:20-5(d) provided statements made by respondent to Frank Cuccio, Esq., were confidential in nature. Further, state common law provided that statements made during the course of an attorney disciplinary proceeding are absolutely privileged, and could not form the basis of a slander action. *Friedland v. Podhoretz*, 174 N.J. Super. 73 (Law Div. 1980).

the state rules were "flagrantly and patently" unconstitutional because of the importance of state interest inpending state disciplinary proceedings. *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982).

The New Jersey Supreme Court enacted Rule 1:20-11(b) in furtherance of its compelling interest and maintaining the integrity of the practicing bar, and its attorney disciplinary process. *In the Matter of the Hearing on Immunity for Ethics Complainants,* 96 N.J. 669, 679 (1984). These are matters historically, and most properly left to the judicial department of the states. *Sperry v. Florida, supra.*

Petitioner, however argues that retroactive application of the rule which acts to deny him his cause of action for the tort of slander, constitutes a denial of due process. This Court has addressed the issue of a federal claim for the tort of slander in the context of a § 1983 proceeding (42 U.S.C. § 1983). In the case of *Paul v. Davis*, 424 U.S. 693, *supra*, the Court held that where defendants, police officers, had allegedly committed a slander against the plaintiff in that action by publishing the plaintiff's photograph on a flyer entitled "City of Louisville, Jefferson County Police Department's Active Shoplifters," did not constitute an actionable violation of § 1983 or the Fourteenth Amendment. In order to recover, the plaintiffs in that case would have had to prove that defendants had deprived him of a right secured by the Constitution of the United States.

> While not uniform in their treatment of the subject, we think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.

Paul v. Davis, supra at 702. Further,

> Respondent in this case cannot assert denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment. That being the case, Petitioner's defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any "liberty" or "property" interests protected by the Due Process Clause.

Id. at 712.

It is clear, therefore, that the right to be free from defamatory or libelous statements, while an important one recognized under state law, is not a constitutional right. It follows, therefore, that a state law or rule restricting or eliminating the right to recover for slander in certain circumstances, cannot constitute a violation of federally guaranteed rights.

Finally, petitioner relies upon the case of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971) for the proposition that that case protects him against retroactive application of the rule. The *Chevron Oil Company* case dealt with the question of whether or not the rule of the Supreme Court stated in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 23 L. Ed. 2d 360, 89 S. Ct. 1835 (1969) that the Louisiana one year statute of limitations for personal injury actions applied to actions under the Outer Continental Shelf Lands Act, rather than the Admiralty Doctrine of Laches, which had previously been applied in actions under the Lands Act. The plaintiff in *Chevron Oil Company* had suffered his injury four years prior to, and filed his action for damages in the Federal District Court one year prior to this Court's decision in the *Rodrique* case. The Court

refused to apply the state's one year statute of limitations retroactively, holding,

> both a devotion to the underlying purpose of the Lands Act's absorption of State Law and a weighing of the equities requires non-retroactive application of the state's Statute of Limitations here.

Chevron Oil Co. v. Huson, at 109. Constitutional principles were in no way considered or affected.

The equities of the within matter have already been considered at the state court level. As has already been illustrated, tort law and the attorney disciplinary process are state court functions. The courts of New Jersey have held that retroactive application of its rule is appropriate because the Supreme Court's interest in protecting the attorney disciplinary process far outweighs the interests of the single private litigant in maintaining his action for a defamation. In the case of *Lands v. Baseman*, 200 N.J. Super. 247 (App. Div. 1985) the Appellate Division of the New Jersey Superior Court, in a published opinion, faced the identical issue, and applied Rule 1:20-11(b) retroactively. In specifically finding that retroactive application of the rule is not constitutionally offensive, the court stated,

> The public interest identified by the Supreme Court in the Rule and in (*In the Matter of the Hearing on Immunity for*) *Ethics Complainants* (96 N.J. 669 [1984]) substantially outweighs in importance the private right which is impaired. (Citation omitted.) And the consequences of retroactive application of the Rule to bar plaintiff's claims are neither harsh nor oppressive. (Citation omitted.)

Id. at 249, 250.

It is respectfully submitted, therefore, that the within matter does not involve an important question of federal law which should be decided by this Court. Certiorari should, therefore, be denied.

CONCLUSION

For the reasons hereinabove set forth, the petition for writ of certiorari should be denied.

Respectfully submitted,

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